Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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KENNETH BRILLINGER, CHRISTINE GRUDZIEN, FREDERICK A. HOLMES, FRED M. SLOAN, LAUREEN WARRICK, For themselves and all others similarly situated,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY; RCA CORPORATION RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATION AND SUBSIDIARY COMPANIES, GE PENSION PLAN,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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KENT CPREK
(Counsel of Record)
SAGOT, JENNINGS & SIGMOND
510 Walnut Street, 16th Floor
Philadelphia, PA 19106-3683
(215) 351-0615

NORMAN ZOLOT
264 Amity Road, P.O. Box 3541
Woodbridge, CT 06525

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTION PRESENTED

1. By way of complement to the same question pending before the Court in *Hughes Aircraft v. Jacobson*, No. 97-1287, *cert. granted*, —— U.S. ——, 66 U.S.L.W. 3531 (April 27, 1998) based on a conflict with this case, whether the Second Circuit erred in holding that employees have no cognizable right to plan assets attributable to their contributions upon the merger of a defined benefit pension plan funded by employee contributions into another pension plan with a different plan sponsor and participants.

## LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Kenneth Brillinger, Christine Grudzien, Frederick A. Holmes, Fred M. Sloan and Laureen Warrick, for themselves and all others similarly situated. The petitioners were participants in the Retirement Plan for Employees of RCA Corporation and Subsidiary Companies who made after-tax employee contributions to that Plan.

The Respondents before this Court are General Electric Company, RCA Corporation, Retirement Plan for the Employees of RCA Corporation and Subsidiary Companies, and the GE Pension Plan. General Electric or one of its subsidiaries acquired the RCA Corporation which originally was an independent corporation and the sponsor of the Retirement Plan for Employees of RCA Corporation and Subsidiary Companies. The status of any other parent company, subsidiary or affiliate of General Electric (within the meaning of Rule 29.1 of this Court) is not currently known to Petitioners.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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### OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 130 F.3d 61 (2d Cir. 1997) and unofficially reported at 21 [B.N.A.] Employee Benefits Cases 2185, [C.C.H.] Pension Plan Guide ¶ 23939K. The opinion is reprinted in the Appendix to this Petition, page 1a, along with the order on a petition for rehearing, p. 16a. The memorandum decision of the District Court is not reported according to a WestLaw search and a manual review of the tables of cases in [B.N.A.] Employee Benefits Cases. It is reprinted in the Appendix to this Petition, page 8a.

## STATEMENT OF JURISDICTION

A panel of the United States Court of Appeals for the Second Circuit entered an opinion and order on December 3, 1997, p. 1a. The judgment affirmed orders of the United States District Court for the District of Connecticut, pp. 12a, 14a. A timely combined petition for rehearing by the panel and suggestion of rehearing *in banc* pursuant to Fed.R.App.Pro. 40, 35 and the rules of the Second Circuit was filed. The petition for rehearing was denied on February 12, 1998, p. 16a. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c), with respect to a petition for a writ of *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 1054. Benefit accrual requirements

* * * *

(g) Decrease of accrued benefits through amendments of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations) or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the

subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

The same essential language appears in 26 U.S.C. § 411 (d)(6) as a condition for "qualification" or tax-exempt status for a pension plan under 26 U.S.C. § 401(a)(7).

29 U.S.C. § 1058. Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merger or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which subchapter III of this chapter applies.

The same essential language appears in 26 U.S.C. § 414(l) as a condition for "qualification" or tax-exempt status for a pension plan under 26 U.S.C. § 401(a)(12).

29 U.S.C. § 1344. Allocation of assets

(a) Order of priority of participants and beneficiaries

In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter (determined without regard to section 1322b(a) of this title), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 1322(b)(5) of this title did not apply.

For purposes of this paragraph, section 1321 of this title shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

* * * *

(b) Adjustment of allocations; reallocations; mandatory contributions; establishment of subclasses and categories

* * * *

(5) The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of amounts paid or distributed to him under the plan before its termination.

* * * *

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)(A) In determining the extent to which a plan provides for the distribution of plan assets to the employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 1058 of this title occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of Title 26.

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056 (d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying—

(i) the market value of the total remaining assets, by

(ii) a fraction—

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants'

mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date—

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefits with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of Title 26 (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990) or section 1104(d) of this title with respect to any distribution of residual assets of a single-employer plan to the employer.

29 U.S.C. § 1344 lies within the jurisdiction of the Pension Benefit Guaranty Corporation and has no parallel in the Internal Revenue Code.

## STATEMENT OF CASE

This case concerns claims of the Petitioners to the portion of the assets of the Retirement Plan for Employees of RCA Corporation and Subsidiary Companies attributable to employee contributions upon its merger

into the GE Pension Plan under 29 U.S.C. §§ 1058, 1344(d)(3). The District Court had subject matter jurisdiction over these claims under 29 U.S.C. § 1132(e).

Petitioners Kenneth Brillinger, Frederick Holmes, Christine Grudzien, Fred Sloan and Laureen Warrick are former employees of RCA Corporation ("RCA"). RCA became a wholly-owned subsidiary of General Electric Company ("GE") in 1986. RCA sponsored and administered a defined benefit pension plan, the Retirement Plan for Employees of RCA and Subsidiary Companies ("RCA Pension Plan"), for the purpose of providing retirement income to its employees. In 1987, GE sold the assets of RCA's Consumer Electronics Division to Thomson Electronics, thereby terminating the employment of the bulk of RCA employees and preventing them from accruing additional retirement benefits under the RCA Pension Plan. GE, however, kept the RCA Pension Plan and did not transfer its assets or liabilities to Thomson.

The RCA Pension Plan was a contributory plan which required that RCA employees make contributions to the plan to fund a defined anticipated monthly pension check (a so-called "defined benefit") at retirement. Petitioners and other RCA employees made such contributions during their tenure with RCA. These contributions were designed to pre-fund a projected benefit at age 65 based on continuing work and salary increases to retirement. There is no evidence of employer contributions in the case.

The assets of the RCA Pension Plan were maintained in a separate and distinct trust for the exclusive benefit of present and former RCA employees. The RCA Pension Plan had grown as a result of the employee contributions and investment earnings far above those assumed in setting the employee contributions. As an additional result of the termination of employment of most RCA employees after the acquisition of RCA by GE, the liabilities of

the RCA plan were reduced as projected benefits, used in setting employee contributions, would never be realized as no future service or salary increases could be earned to increase benefits under the RCA Plan.

The result of earnings over expectations and terminations causing a reduction in liabilities was a surplus in the pension trust. As of January 1, 1988, the RCA Pension Plan had assets of $2,812,386,957 and benefit liabilities of only $1,468,009,771 according to its actuarial reports, leaving residual assets of $1,344,377,186. Had the RCA Pension Plan then formally terminated under Pension Benefit Guaranty Corporation ("PBGC") procedures, 29 U.S.C. § 1344(d)(3) admittedly would entitle the employees to a share of any current surplus, based roughly on the ratio of employee to employer contributions to the RCA Pension Plan.

GE sponsored its own defined benefit pension plan, the GE Pension Plan ("GE Plan"), to provide retirement income to its own separate employees. Before January 1, 1989, the GE Plan and RCA Plan were separate plans and trusts. Rather than terminating the inactive RCA Plan and distributing the employees' share of residual assets to them, GE instead merged the RCA Plan into the GE Plan.

Under the terms of the merged Plan, the former RCA Plan participants became deferred vested participants in the GE Plan. The merged plan limits their benefits to the original minimum monthly benefits set by RCA for service through December 31, 1988. The terminated employees cannot earn any additional retirement benefits from the GE Pension Plan as they do not work for GE. The GE Pension Plan gave nothing to RCA employees for residual assets representing investment earnings on their employee contributions even though their contributions prefunded the RCA Plan for projected benefits much higher than they will ever receive. Even though neither GE nor its employees ever contributed a dime to the RCA

Pension Plan, GE has taken all of the $1.3 Billion in remaining RCA Plan assets to satisfy its pension obligations to GE employees.

## REASONS FOR GRANTING THE WRIT

Petitioners Kenneth Brillinger, Christine Grudzien, Frederick A. Holmes, Fred M. Sloan and Laureen Warrick, for themselves and all others similarly situated, petition the Court to issue a writ of certiorari to review a decision and order of the United States Court of Appeals for the Second Circuit. The panel erroneously concluded that employees have no claim to the portion of $1.3 Billion of residual RCA Pension Plan assets attributable to contributions by RCA Employees upon the merger of the RCA Pension Plan into the GE Pension Plan.

### I. THIS CASE CONFLICTS WITH AND RAISES THE SAME ISSUE CONCERNING EMPLOYEE RIGHTS TO PENSION PLAN ASSETS ATTRIBUTABLE TO THEIR CONTRIBUTIONS AS *HUGHES AIRCRAFT v. JACOBSON*, NO. 97-1287, *CERT. GRANTED*, —— U.S. ——, 66 U.S.L.W. 3531 (APRIL 27, 1998), WHICH IS PENDING BEFORE THE COURT ON CERTIORARI

On April 27, 1998, the Court granted a writ of certiorari in *Hughes Aircraft v. Jacobson Aircraft*, No. 97-1287, —— U.S. ——, 66 U.S.L.W. 3531 (1998) with respect to the decision of the Ninth Circuit in *Hughes Aircraft v. Jacobson Aircraft*, 105 F.3d 1288 (9th Cir. 1997). Question 3 in that petition reads as follows:

> 3. Whether the Ninth Circuit erred by concluding, contrary to three other circuits, that participants in a defined-benefit plan have a legally-cognizable property interest not only in their defined benefits but also in the assets held by the plan [attributable to employee contributions].

The petition in *Hughes Aircraft v. Jacobson Aircraft*, No. 97-1287, p. 19, quoted the decision of the Second

Circuit in this case to show a conflict in the circuits on this question which required resolution by the Court.

The Second Circuit's conclusion, quoted in the *Hughes* petition, *id.*, that "[p]articipants in a defined benefit plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities," *Brillinger v. Gen. Electric Co.*, 130 F.3d 61, 64 (2d Cir. 1997) ignores the Congressional decision to enact 29 U.S.C. § 1344(d)(3) to encourage and protect employee contributions. *H.R. Report 100-391*, reprinted at [1987] U.S. Code Cong. & Admin. News at 2314-104, explained that the express purpose of this provision was to assure that there will "virtually always be a distribution to participants and beneficiaries" from residual assets of a pension plan to which they have contributed in order to maintain employee trust and the flow of contributions to defined benefit plans.

Employee contributions minimize and may even eliminate the need for substantial employer contributions—as indeed appears to have happened in the RCA Plan. As employee contributions are regular and not dependent on current actuarial computations of funding needs, they also limit the volatility of employer contribution obligations. Ongoing employee contributions and investment gains on those contributions in good markets certainly reduce the risk that a pension fund will suddenly develop unfunded liability in a drop in the stock markets and trigger a need for large and immediate employer contributions. The willingness of employees to participate in this program and their confidence in the basic system is destroyed if they are not assured that the fruits of their contributions and investment are not protected.

*Jacobson v. Hughes Aircraft*, 105 F.3d at 1294, thus concluded that "to ignore the distinction between a plan funded solely by employer contributions and a plan funded by both employer and employee contributions would evis-

cerate the protections provided to employees under ERISA with respect to their employee contributions." Thus "when both the employer and its employees contribute to a pension plan, the employer does not have sole discretion to use a plan's asset surplus attributable in part to employee contributions to benefit itself and employees that were never participants in the plan" in a plan reorganization, *Jacobson*, 105 F.3d at 1294. *Borst v. Chevron*, 36 F.3d 1308, 1315 (5th Cir. 1994), agreed that "ERISA . . . markedly distinguishes between [residual assets] attributable to employer contributions and those attributable to employee contributions" and carefully noted, *Borst*, 36 F.3d at 1313 n.6, that its decision was limited to a non-contributory plan.

As in *Jacobson*, it is uncontested that the RCA Employees would be entitled to a share of the assets of the RCA plan remaining after claims under 29 U.S.C. § 1344(a) had been satisfied had the plan formally terminated at the date of its merger with the GE Pension Plan. Under the arguments of *Hughes* and the Second Circuit decision in this case, employees will nonetheless virtually never receive the share of plan asset attributable to their employee contributions. These assets will instead disappear and be used for other purposes through manipulation of plan assets in a parade of plan "amendments," mergers, transfers before a formal termination filing with the Pension Benefit Guaranty Corporation. The underlying premise of the Second Circuit, *Brillinger*, 130 F.3d at 62, that "if the investment of plan assets is successful and produces a surplus, [only] the employer benefits" is judicial legislation which disregards both plain statutory language and express Congressional purpose to allow this result.

## II. THIS CASE CLEANLY PRESENTS THE ISSUE OF EMPLOYEE RIGHTS UNDER 29 U.S.C. § 1058 IN A PENSION PLAN REORGANIZATION BY PLAN AMENDMENT, MERGER OR TRANSFER WHICH MAY MOOT THE OTHER QUESTIONS PRESENTED IN *HUGHES AIRCRAFT v. JACOBSON*

This case involves a claim to residual assets attributable to employee contributions pursuant to 29 U.S.C. § 1058 in a merger of pension plans. 29 U.S.C. § 1058 provides:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

*Kinek v. Paramount Communications*, 22 F.3d 503, 509, 511 (2d Cir. 1994) concluded that the language of 29 U.S.C. § 1058 provides "unambiguously that plan participants are entitled, . . ., to exactly what they would have received in the event of an actual termination" and nothing less in a merger, consolidation or transfer of assets or liabilities between pension plans.

The District Court in *Jacobson v. Hughes Aircraft* denied leave to amend the complaint, *Jacobson*, 105 F.3d at 1292, and thus foreclosed consideration of claims that the *Hughes* transaction should be treated as a transfer or merger under 29 U.S.C. § 1058. If transactions of the *Hughes* variety are subject to 29 U.S.C. § 1058 with the same protection of employee interests as a formal termination, the issues presented by *Hughes* on the scope of plan "amendments" and the procedural and substantive requirements for plan "termination" have little importance for future cases.

Judges Cudahy, Posner and Brown of the Seventh Circuit concluded that a plan "amendment" can also be a

"merger" or "transfer" which is subject to 29 U.S.C. § 1058 in *Hickerson v. Velsicol Chemical*, 778 F.2d 365, 378 (7th Cir. 1985). See also, IRS Regulation [26 C.F.R.] 1.411(d)-4 Q&A2(a)(3) ("[t]he prohibition against the elimination of . . . [accrued benefit promises by plan amendment under 26 U.S.C. § 411(d)(6) and 29 U.S.C. § 1054(g)] . . . applies to plan mergers, spin-offs, transfers and transactions amending or having the effect of amending a plan to transfer benefits"). In *Hickerson*, the Seventh Circuit treated an "amendment" of a defined contribution plan (in which all investment earnings go to employees) to convert it into a defined benefit plan (through a formula using an excessively low interest rate to value employee interests) as a sequential transfer and merger subject to 29 U.S.C. § 1058.

The Seventh Circuit, *Hickerson*, 778 F.2d at 377, concluded that ". . . ERISA allows plan amendment. But it is a different matter to permit this flexibility to become the basis for . . . changes [in a plan] in an attempt to generate a windfall [to an employer]." *Hickerson*, 778 F.2d at 379, thus required the plan to appraise its assets at market value and provide a minimum benefit based on the annuity which could be purchased with the employees' money at the date of "amendment" as if the plan had then terminated. This is the precise relief sought in *Jacobson* and this case.

A "transfer" within the meaning of 29 U.S.C. § 1058 (and its counterpart in the Internal Revenue Code, 26 U.S.C. § 414(1)) occurs whenever there is a reduction in the assets or liabilities of one plan and corresponding increase in the assets or liabilities of another plan and expressly includes transfers of employees between plans, I.R.S. Regulation [26 C.F.R.] 1.414(1)-1(b)(3) ("Transfer of Assets or Liabilities"), *Jacobson*, 105 F.3d at 1291, 1306, notes that Hughes gave its employees a one-time choice between the "Contributory Plan" and

"Non-Contributory Plan" which falls squarely within this definition.

A merger is defined by I.R.S. Regulations [26 C.F.R.] 1.414(1)-1(b)(2), (1) only in terms of the legal result of a traditional corporate merger—an assumption of all liabilities and assets by a single entity. See, *Hickerson*, 778 F.2d at 374 (so noting). As in *Hickerson*, Hughes' plan "amendment" might also properly be characterized as a two-step transaction, involving the establishment of a new Non-Contributory Plan which then was merged with the existing Contributory Plan in a transaction subject to 29 U.S.C. § 1058. The existence of a merger is not contested in this case.

*Hickerson* and *Jacobson* are not alone in protecting employee claims. The consensus view of the ABA Employee Benefits Section, (Sacher, et al. Eds.), *Employee Benefits Law*, pp. 177-178 (ABA 1991), is that ERISA requires that residual assets attributable to employee contributions must follow the employees in a pension plan transfer or merger. *Kinek* followed the same path as the ABA—only to go without mention in the Second Circuit panel decision in this case. In *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group, Inc. Profit Sharing Plan*, 26 F.3d 360, 365 (2d Cir. 1994), the Second Circuit held that 29 U.S.C. § 1058 prevented an employer from "pocketing" investment gain attributable to the assets of a transferred defined contibution plan for itself and its employees. *Holland v. Valhi, Inc.*, 22 F.3d 968, 973 (10th Cir. 1994) rejected a variant of the General Electric approach in a spinoff/termination which sought to reduce the employee claims to .0015% of residual assets even though employees had contributed roughly 25% of the total contributions to the plan.

The evasion of 29 U.S.C. § 1344(d)(3) which results in the absence of a full allocation of assets in a plan reorganization is readily apparent in a transfer by spin-off. For example, assume that GE in this case had transferred

existing plan liabilities as well as RCA's business to Thomson (as GE did in the sale of GE Aerospace to Lockheed Martin which is at issue in *Flanigan v. GE*, No. 3:93-CV-516 (D.Conn.)). Under the decision of the Second Circuit below, GE would only have been required to transfer assets of $1,468,009,771 (the value of basic "accrued benefits" under the terms of the plan) to the buyer, Thomson, in order to comply with 29 U.S.C. § 1058 in that transaction. The RCA plan would remain with GE and still have unallocated assets of $1,344,377,186 (representing the excess of the fair market value of assets over accumulated benefits, *id.*) but no participants or liabilities. GE could then terminate the plan and cause a reversion of the unallocated surplus of $1,344,377,186, including gain attributable to employee contributions, to itself with no allocation to employees in a formal plan termination process. Employees would never see the gain on their contributions as GE, despite the requirements of 29 U.S.C. § 1344(d)(3) and condemnation of *John Blair*, 26 F.3d at 365, "[pocketed] the difference which rightly belong[ed] to the . . . members [of the RCA plan]" for its own direct use and benefit.

Section 1058 also imposes "anti-dilution obligations" in a merger, *Malia v. Gen. Electric Co.*, 23 F.3d 828, 833 (3d Cir. 1994). In this case, the RCA plan with $1,468,009,771 in basic benefit obligations under plan terms and $2,812,386,947 in assets was merged into a much larger GE plan which had benefit liabilities of some $15 Billion and assets of roughly the same amount. In this circumstance, the plan still has residual assets of $1.3 Billion immediately after the merger. The employees' share will, however, fall immediately upon the merger as the numerator under 29 U.S.C. § 1344(d)(3) will remain constant while the denominator (which, for actuarial reasons, see n. 2, estimates the value of total employer and employee contributions as equal to the liability for accrued benefits) mushrooms from $1.47 Billion to $16.47 Billion. If employee contributions represented only 25% of the

total contributions to the RCA Plan, the result is an overnight loss of more than $300 Million by employees.[1] The Second Circuit simply lost sight of this $300 Million overnight loss in concluding that RCA employees have received the same benefit in the merger as they would have received if the RCA Plan had terminated immediately before the merger.

The Second Circuit sought to justify this result on the basis of a distinction between "assets" and 'benefits." Its conclusion that 29 U.S.C. §§ 1058, 1344 protect an employee's rights to a promised benefit—as opposed to the assets allocated to his claims against the plan under the priority system in 29 U.S.C. § 1344—contradicts the title and direction of 29 U.S.C. § 1344(a) that "[t]he plan administrator shall allocate the assets of the plan . . ." in a specified order of priority and the holding of *Mead Corp. v. Tilley*, 490 U.S. 714, 717, 109 S.Ct. 2156, 2159 (1989), that 29 U.S.C. § 1344 "requires that plan assets be distributed to participants . . .".

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[1] To illustrate in mathematical terms, assume that benefits under 29 U.S.C. § 1344(a)(2) for the RCA Plan before the merger equal 25% of total basic plan benefits of $1,468,009,771 or $367,002,443. The employees' share of residual assets of the RCA Plan under 29 U.S.C. § 1344(d)(3) before the merger would then be as follows:

$$\frac{\$367,002,443 \text{ [25\% of total liability of } \$1,468,009,771\text{]}}{\$1,468,009,771 \text{ [RCA Plan basic benefit liabilities]}}$$

The employees would then have been entitled to 25% of the residual assets of $1,344,377,186 or $336,094,297.

Without a special allocation to protect the employee interest in residual assets, the fraction in the event of a termination of the GE plan immediately after the merger would be as follows:

$$\frac{\$367,002,443}{\$16,468,009,771 \text{ [combined RCA Plan and GE Plan basic benefits]}}$$

While the residual assets would remain constant at $1,344,377,186, the RCA employees now would be entitled only 2.23% of the residual assets or $29,960,494—a reduction of some $306,122,802 overnight.

The "benefit" protected by 29 U.S.C. § 1058 is a lump sum cash value defined by an allocation of assets to payments due from the pension plan to participants, immediately or on a deferred basis, under 29 U.S.C. § 1344. There is no guarantee that the allocated assets actually will buy the retirement benefits promised to the participant by the employer. See, e.g., *Steelworkers Local 2116 v. Cyclops Corporation*, 860 F.2d 189, 199 (6th Cir. 1988) (assets ran out in 29 U.S.C. § 1344(a)(3) priority); *Aldridge v. Lily-Tulip, Inc. Salary Retirement Benefits Committee*, 953 F.2d 587, 591-592 (11th Cir. 1992) (assets exhausted before 29 U.S.C. § 1344(a)(6) category). On the converse side, there is no basis to ignore the plain language and purpose of 29 U.S.C. §§ 1058, 1344(d)(3) to deprive the employee of the fruits of investment of his contributions when assets run past the priority for "benefits under the plan" in 29 U.S.C. § 1344 (a)(6).

The rights of an employee in a contributory defined benefit plan based on his own contributions are always stated in terms of a lump sum account equal to his contributions plus interest at Treasury rates. See 29 U.S.C. § 1054(c)(2)(C) (definition of "accumulated contributions" account). This lump sum value is then converted into an annuity benefit to be provided by the plan under a statutory formula, 29 U.S.C. § 1054(c)(2)(B), (c)(3). See also, 29 C.F.R. §§ 4044.11(b), 4044.12(b) (same for employee contribution accounts on asset allocation on termination of a defined benefit plan). As *Bridgestone/ Firestone, Inc. v. PBGC*, 892 F.2d 105, 109-110 (D.C. Cir. 1989), explains in detail, 29 U.S.C. § 1344(d)(3) is a legislative compromise to allow earnings on employee contributions to fund the employer's basic benefit promise first and to subordinate both employer and employee claims to actual investment earnings over Treasury rates.[2]

[2] The employer's contributions are actuarially determined based on the "accrued benefit" liability of the plan. See, 29 U.S.C. § 1082. 29 U.S.C. § 1344(d)(3) thus uses a denominator to allocate residual

The subordination and lower priority attached to such claims does not mean that they can be ignored and defeated by a plan "amendment", merger, consolidation or transfer before a formal termination filing with the Pension Benefit Guaranty Corporation.

## CONCLUSION

The Court should grant *certiorari* or hold this case pending disposition of *Hughes Aircraft v. Jacobson*. If the Court determines that employees have a right to protection of assets attributable to their employee contributions against dilution in a merger or transfer, the case should be remanded for further proceedings in accordance with the decision of the Court.

Respectfully submitted,

KENT CPREK
(Counsel of Record)
SAGOT, JENNINGS & SIGMOND
510 Walnut Street, 16th Floor
Philadelphia, PA 19106-3683
(215) 351-0615

NORMAN ZOLOT
264 Amity Road, P.O. Box 3541
Woodbridge, CT 06525

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assets which estimates total contributions to the plan as the total liability of the plan for basic accrued benefits. This credits employer contributions with "interest" at Treasury or comparable rates in reverse by discounting future benefit payments to the present at such rates. See, 26 U.S.C. § 417(e)(3)(A)(ii)(II) (use of Treasury rate to calculate lump sum benefit values).

# APPENDICES

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 238—August Term 1997

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Docket No. 97-7092

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KENNETH BRILLINGER, CHRISTINE GRUDZIEN, FREDERICK A. HOLMES, FRED M. SLOAN, LAUREEN WARRICK, for themselves and all others similarly situated,

*Plaintiffs-Appellants,*

v.

GENERAL ELECTRIC COMPANY, RCA CORPORATION, RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATON AND SUBSIDIARY COMPANIES, and GE PENSION PLAN,

*Defendants-Appellees.*

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(Argued: September 3, 1997

Decided: December 3, 1997)

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BEFORE: MINER, LEVAL *Circuit Judges*, and GRIESA, *District Judge* [1]

Plaintiffs represent a class of current and former employees of RCA Corporation, who were participants in a "defined benefit" pension plan administered by RCA.

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[1] Hon. Thomas P. Griesa, Chief Judge, United States District Court for the Southern District of New York, sitting by designation.

They claim that when the RCA plan was merged with a similar plan administered by General Electric Company, at the time the two companies merged, the participants in the RCA plan were entitled to have their benefits increased to take into account surplus assets in the RCA plan allocable to their contributions. The United States District Court for the District of Connecticut (Dorsey, C.J.) dismissed the claim as legally insufficient, pursuant to Fed. R. Civ. P. 12(b)(6). We conclude that, because of the nature of a defined benefit plan, the plaintiff class was not entitled to an increase in benefits at the time of the merger. We therefore affirm.

*The Claim*

Two class actions were brought in the district court, one by plaintiffs Brillinger, Grudzien, Holmes and Sloan, and the other by plaintiff Warrick. The complaints in the two actions asserted essentially the same claim. The actions were consolidated and both complaints were dismissed by Judge Dorsey. This appeal covers both actions.

The complaints make the following allegations. The statutory references are to sections of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

RCA had a defined benefit pension plan within the meaning of 29 U.S.C. § 1002(35). Members of the plaintiff class made contributions to this plan. In 1986 RCA merged into a wholly-owned subsidiary of GE, which also had a defined benefit pension plan. Effective January 1, 1989 the RCA plan and the GE plan merged.

As of January 1, 1988, the RCA plan had assets of $2,812,386,957 and liabilities of $1,486,009,771, leaving "residual assets" of $1,344,377,186. The residual assets were even greater as of the time of the plans' merger, although the exact figure is not shown. Plaintiffs claim that, when the two plans merged, this was an event which

should have led to a revision of benefits to be paid to the former RCA employees to take into account the residual assets in the RCA plan attributable to employee contributions. It is claimed that this revision was required by 29 U.S.C. §§ 1058 and 1344(d)(3). No such revision has been made. Plaintiffs seek a judgment declaring their rights.

*Discussion*

The definition of "defined benefit plan" is given in 29 U.S.C. § 1002(35):

> (35) The term "defined benefit plan" means a pension plan other than an individual account plan, . . .

An "individual account plan," also referred to as a "defined contribution plan," is defined in 29 U.S.C. § 1002(34). In a defined contribution plan the benefits are based upon the contributions, subject to gains or losses which occur in the plan's assets.

> (34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

By contrast, a defined benefit plan is one where the employee, upon retirement, is entitled to a fixed periodic payment regardless of the performance of the plan's assets. *Commissioner v. Keystone Consolidated Industries*, 508 U.S. 152, 154 (1993). If unsuccessful investment of the plan assets impairs the plan's ability to make up the scheduled payments from the plan assets, the employer must nonetheless make up any deficiency from its own assets. By the same token, if the investment of plan assets is successful and produces a surplus, the employer benefits. *Malia v. General Electric Co.*, 23 F.3d 828, 830 n.2 (3d Cir. 1994).

ERISA contains a provision, 29 U.S.C. § 1058, dealing with the merger of pension plans:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan . . ., unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

Under this provision, a merger may not cause reduction of the benefit below what it would be upon a hypothetical termination of the plan.

In so providing, Congress obviously intended to refer to those portions of ERISA which deal with the termination of a plan. However, § 1058 does not specify which of the several provisions relating to termination are to be applied.

In contending that the present merger violates § 1058, plaintiffs point to the section which deals with distribution of residual assets at the time a plan is terminated. According to this portion of ERISA, if there are more than enough assets to cover the accrued benefit liabilities, the excess—or the residual assets—may be distributed to the employer. 29 U.S.C. §§ 1344(d)(1) and (2). However, the right of the employer to receive the residual assets is qualified by § 1344(d)(3)(A) which states:

> (3)(A) . . . if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries.

Thus, upon termination of a plan, in the event there are residual assets attributable to employee contributions, such assets must be distributed to the contributing employees.

Plaintiffs argue that, since a merger is to be treated under § 1058 like a termination for the purpose of benefit calculation, then a plan's participants should receive whatever they would receive upon a termination, including residual assets, as provided for in § 1344(d)(3)(A). They argue that § 1058 should be construed as requiring that the amount of such residual assets be converted into increased benefits.

We do not agree with plaintiffs' view of the statute.

Section 1058 deals with the level of post-merger benefits, and in dealing with this issue resort must be had to those parts of the termination provisions which deal with the analogous subject—*i.e.*, the level of benefits following termination. When the termination provisions are analyzed, it will be seen that those dealing with benefits are quite distinct from those dealing with distribution of residual assets.

The basic procedures to be followed when a plan is terminated are specified in 29 U.S.C. §§ 1341 and 1342. There must be an assessment of the terminating plan's assets and accrued benefit liabilities. Assets must be allocated to various types of benefit liabilities in order of priority pursuant to § 1344(a). To the extent that assets are sufficient to cover liabilities under a plan, the administrator of a terminating plan is directed to "fully provide all benefit liabilities under the plan." § 1341(b)(3)(A)(ii). This may involve purchasing "irrevocable commitments from an insurer to provide all benefit liabilities under the plan." § 1341(b)(3)(A)(i). Where the assets are sufficient, the level of benefits to be paid following termination will be equal to what is specified in the plan.

There are several provisions dealing with the procedures to be used, and the level of benefits to be paid, where a

plan falls into difficulty and where the assets are insufficient to cover liabilities. *See e.g.*, § 1341(c). Ultimately, the Pension Benefit Guaranty Corporation guarantees the payment of benefits subject to certain limitations specified in §§ 1322 and 1361. For instance, benefits in effect for less than five years at the time of termination are not fully guaranteed. § 1322(b).

Of course, the issue in the present case relates to *excess* assets. The statutory mechanism for dealing with this situation in an actual termination situation is not to increase the level of benefits, but to make distribution of the residual assets at the time of the termination. Sections 1344(d)(1) and (2) provide that any residual assets may be distributed to the employer if all liabilities of the plan to participants and their beneficiaries have been satisfied, as long as this distribution does not contravene any other provision of law and as long as the plan allows for such distribution. However, the right of the employer to receive residual assets is subject to § 1344(d)(3)(A), which is the provision relied upon by plaintiffs and which has already been quoted. It specifies that, in the event that there are residual assets attributable to employee contributions, such assets must be distributed to the contributing employees.

Thus, when a plan is terminated, and where there are residual assets over and above what is necessary to cover benefit liabilities, the fund participants receive both the agreed-upon benefits and, in addition, that portion of the residual assets attributable to their contributions. This brings us back to plaintiffs' argument that, pursuant to § 1058's reference to termination, the participants in a merging plan should receive all of this in the form of increased benefits following a merger.

But the termination provisions of the statute make a distinction between paying *benefits*, generally on an ongoing basis, and the one-time distribution of residual assets. Since § 1058 deals with the level of benefits, the rea-

sonable interpretation of that section is that it refers to those portions of the termination provisions regarding the level of benefits, rather than the part about distributing residual assets. The fact that upon actual liquidation a participant may be entitled to receive some distribution of residual assets does not change the amount to be received as a "benefit." Section 1058 requires only that the "benefit" payable upon hypothetical termination be no less after than before the merger. It makes no reference to amounts the participants might receive as distribution of residual assets upon such hypothetical termination.

It is also important to recall the distinction made in the statute between a defined benefit plan and an individual account or defined contribution plan. Participants in a defined benefit plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities. There is nothing in the statute to the effect that such growth in assets will cause an increase in benefits payable to participants at the time of a merger. Nothing in § 1058 or any other part of the statute is to the effect that a merger turns a defined benefit plan into a defined contribution plan, either temporarily or permanently.

We therefore hold that the participants in the RCA plan were not entitled to have their benefits increased at the time of the merger with the GE plan, to take into account the existence of the RCA plan's residual assets.

The issue we have dealt with here was addressed by the Third Circuit in *Malia v. General Elec. Co.*, 23 F.3d 828 (3d Cir. 1994). Our conclusion is the same although our discussion is somewhat different.

We affirm the dismissal of the complaints by the district court.

**APPENDIX B**

[Filed. Oct. 15, 1996]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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Civil No. 3:94 CV2213 (PCD)

LAUREEN WARRICK,
*Plaintiff,*

VS.

GENERAL ELECTRIC COMPANY, *et al.*,
*Defendants.*

---

Civil No. 3:95 CV2758 (PCD)

KENNETH BRILLINGER, *et al.*,
*Plaintiffs,*

VS.

GENERAL ELECTRIC COMPANY, *et al.*,
*Defendants.*

---

RULING ON MOTIONS TO DISMISS

Defendants move to dismiss Count One of the complaint in *Brillinger, et al. v. Gen. Electric, et al.*, Civ. No. 3:95CV2758 and the entire complaint in *Warrick v. Gen. Elec. Co., et al.*, Civ. No. 3:94CV2213 pursuant to Fed. R. Civ. P. 12(b)(6).

## I. INTRODUCTION

Plaintiffs were formerly employed by RCA Corporation ("RCA"), which became a wholly-owned subsidiary of General Electric ("GE") in 1986. Plaintiffs were participants in the RCA defined benefit pension plan ("RCA Plan"). The RCA plan was merged with the GE Pension Plan ("GE Plan"). At the time of the merger, the RCA Plan's assets exceeded its benefit liabilities. Plaintiffs contend that former RCA plan participants are entitled to a share of the "residual assets," *i.e.*, the assets held by the plan in excess of what is necessary to pay for accrued benefits, of the RCA Plan at the time of the merger.

## II. DISCUSSION

A motion to dismiss should be granted only when "it appears beyond doubt" that a plaintiff fails to state any claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *Conley v. Gibson*, 355 U.S. 41, 45 (1957). All facts alleged in the complaint are presumed to be true and are considered in the light most favorable to the nonmovant. *Williams v. AVCO Lycoming*, 755 F. Supp. 47, 49 (D. Conn. 1991).

Plaintiffs claim that the failure to distribute the residual assets to RCA Plan participants violates Section 208 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 28 U.S.C. § 1058, and Section 4044(d)(3), 29 U.S.C. § 1344(d)(3). *Malia v. Gen. Elec. Co.*, 23 F.3d 828 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 377 (1994), although involving different plaintiffs, addressed these same claims regarding the merger of the GE and RCA plans and concluded that RCA participants did not have a right under §§ 1058 and 1344(d)(3) to residual assets in a plan merger. *Id.* at 833. Familiarity with the arguments of the parties in *Malia* and the Third Circuit's ruling is presumed for purposes of this ruling. Despite plaintiffs protestations to the contrary, it is found that the reasoning in *Malia* is persuasive,

and that Second Circuit authority does not compel otherwise.

Plaintiffs rely on *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo Group Inc. Profit Sharing Plan*, 26 F.3d 360 (2d Cir. 1994) and *Kinek v. Paramount Communications, Inc.*, 22 F.3d (2d Cir. 1994) for their assertion that *Malia* does not control in the Second Circuit. *John Blair* is easily distinguishable, as it involved the retention of a predecessor defined contribution plan's assets for a period of time after the closing date of a spinoff. In *John Blair*, the court ruled that such retention violated § 1058 because participant's accounts did not reflect the gain occurring during the interim period before the actual transfer of their assets from the predecessor plan assets. However, the *John Blair* court noted that other cases held that § 1058 was not violated by retention of a defined benefit plan's assets for a period of time. *John Blair* at 366; *See Koch Industries, Inc. v. Sun Co.*, 918 F.2d 1203 (5th Cir. 1990) and *Bigger v. Am. Commercial Lines*, 862 F.2d 1341 (8th Cir. 1988). The court noted that in *Koch* and *Bigger*, the courts had concluded that "unlike a defined contribution plan where a beneficiary's level of benefits depends on the assets retained in his or her individdual account, with a defined benefit plan, 'the level of benefits does not depend on the amount of funds transferred.'" *John Blair* at 366 (quoting *Koch*, 918 F.2d at 1206). Thus, the distinction between the operation of defined contribution plans and defined benefit plans makes *John Blair* inapplicable to the present case. In any even, *John Blair* involved the retention of assets before they were transferred to the new plan, not a distribution of the assets to participants.

*Kinek* is also inapposite. In *Kinek*, the Second Circuit held that a plan provision similar to § 1058 was to be read that participants were "entitled, in the event of a spinoff, to what they should have received in the event of an actual termination," *Kinek* at 511. Because another

plan provision guaranteed full payment of accrued benefits at the time of a spinoff, the employer was required to fully fund the plan so that all the accrued benefits of the participants were covered. *Id.* at 509.

First and foremost, *Kinek* is distinguishable because it involved the spinff of an underfunded plan, *not*, as in this case, an overfunded plan. Thus, the result of *Kinek* was to protect accrued benefits of participants, not residual assets. Furthermore, in *Kinek*, the Second Circuit expressly refused to interpret the requirements of § 1058, basing its decision on its interpretation of the particular plan provision at issue. *Id.* at 510 n.4.

Therefore, plaintiffs' have failed to state a claim under ERISA in Count One of the complaint in *Brillinger* and in the *Warrick* complaint.[1]

## III. CONCLUSION

Accordingly, defendants' motions to dismiss in *Brillinger* and *Warrick* are granflted.

SO ORDERED.

Dated at New Haven, Connecticut, October 15, 1996.

/s/ Peter C. Dorsey
Chief U.S. District Judge
PETER C. DORSEY

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[1] A related case, ***Flanigan, et al. v. Gen. Elec, et al***, Civ. No. 3:94CV5165 (JBA) is currently pending before U.S. District Court Judge Janet Bond Arterton. In that case, which involved the defined benefit plans of GE and Martin-Marietta, plaintiffs contend that they were entitled to the residual assets of the GE plan upon transfer to the Martin-Marietta plan. On September 26, 1996, in that case, it was held that plaintiffs' failed to state a claim upon which relief could be granted under the same ERISA provisions cited in the present case. ***Malia*** was held to be persuasive, and ***Kinek*** and ***John Blair*** did not compel otherwise.

**APPENDIX C**

[Filed Oct. 21, 1996]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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Case No. 3:94CV02213 (PCD)

LAUREEN WARRICK

v.

GENERAL ELECTRIC COMPANY, RCA CORPORATION, RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATION AND SUBSIDIARY COMPANIES, and GE PENSION PLAN

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## JUDGMENT

This cause having come on for consideration of defendants' motion to dismiss before the Honorable Peter C. Dorsey, Chief United States District Judge, and the issues having been duly considered and on October 15, 1996, a Ruling having been filed granting the motion,

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants dismissing the entire complaint.

Dated at New Haven, Connecticut, this 21st day of October, 1996.

KEVIN F. ROWE

Clerk
United States District Court

By: [Illegible]
Deputy in Charge

## APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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Civil No. 3:94CV2213 (PCD)

LAUREEN WARRICK,
*Plaintiffs,*

-vs-

GENERAL ELECTRIC COMPANY, *et al.*
*Defendants.*

---

Civil No. 3:95CV2758 (PCD)

KENNETH BRILLINGER, *et al.*,
*Plaintiffs,*

-vs-

GENERAL ELECTRIC COMPANY, *et al.*,
*Defendants.*

---

ORDER

Pursuant to a ruling issued October 15, 1996, defendants' motions to dismiss in the above-captioned cases have been granted. The only remaining count is Count II of the *Brillinger* complaint. Discovery on this count shall be completed and dispositive motions filed on or before December 15, 1996. At that time, a trial preparation order shall issue.

SO ORDERED.

Dated at New Haven, Connecticut, October 15, 1996.

/s/ Peter C. Dorsey
PETER C. DORSEY
Chief U.S. District Judge

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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Civil Action No. 3:95-CV-02785 (PCD)

KENNETH BRILLINGER, *et al.*,
*Plaintiff,*

v.

GENERAL ELECTRIC COMPANY, *et al.*,
*Defendants.*

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**STIPULATION OF DISMISSAL OF COUNT II OF PLAINTIFFS' AMENDED COMPLAINT**

The parties, through their attorneys, hereby stipulate pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) to the dismissal of Count II of Plaintiffs' Amended Complaint in the above-referenced action with prejudice, without any award of fees and costs by the Court as to said Count.

/s/ Mark S. Dichter
MARK S. DICHTER (ct01330)
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5291

BRIAN J. DOUGHERTY
RICHARD G. ROSENBLATT
MORGAN, LEWIS & BOCKIUS, LLP
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-4883/5511

BONNIE PIERSON-MURPHY
(ct11708)
PAUL, HASTINGS, JANOFSKY &
WALKER
1005 Washington Blvd., 9th Floor
Stamford, CT 06901
(215) 961-7400

Attorneys for Defendants
General Electric Company,
RCA Corporation Retirement
Plan for the Employees of RCA
Corp. and Subsidiary Companies,
and GE Pension Plan

/s/ Norman Zolot
NORMAN ZOLOT (ct01168)
264 Amity Road
Woodbridge, CT 06525
(203) 397-5346

LAWRENCE H. LISSITZYN
SHERRI MCKELVEY
REID AND RIEGE, P.C.
One State Street
Hartford, CT 06103
(203) 278-1150

Attorneys for Plaintiffs

Dated: 12/13/96

Dated:

As stipulated by the parties, Count II is dismissed. Since Count I was previously dismissed, this action is dismissed in its entirely. SO ORDERED.

/s/ Peter C. Dorsey
PETER C. DORSEY
Chief U.S.D.C. Judge

**APPENDIX F**

[Filed Feb. 12, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12 day of February one thousand nine hundred and ninety-eight,

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Dkt No. 97-7092

BRILLINGER
*Plaintiff-Appellant*
v
GENERAL ELECTRIC CO.
*Defendant-Appellee*

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A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Kenneth Brillinger.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED. It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
George Lange III,
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

## APPENDIX G

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

CT/NHCT
95-CV-2758
DORSEY

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Squire, in the City of New York, on the 3rd day of December, one thousand nine hundred and ninety-seven.

PRESENT: HON. ROGER J. MINER
HON. PIERRE N. LEVAL
Circuit Judges
HON. THOMAS P. GRIESA
District Judge *

Docket No: 97-7092

KENNETH BRILLINGER; CHRISTINE GRUDZIEN; FREDERICK A. HOLMES; FRED M. SLOAN; LAUREEN WARRICK, for themselves and all others similarly situated,

*Plaintiffs-Appellants,*

v.

GENERAL ELECTRIC COMPANY; RCA CORPORATION; RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATION AND SUDSIDIARY COMPANIES; and GE PENSION PLAN,

*Defendants-Appellees.*

---

* The Honorable Thomas P. Griesa, Chief Judge, United States District Court for the Southern District of New York, sitting by designation.

Appeal from United States District Court for the District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
GEORGE LANE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

ISSUED AS MANDATE: Feb. 19, 1998

SUPREME COURT, U.S.
FILED
JUN 12 1998
CLERK

No. 97-1834

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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KENNETH BRILLINGER, CHRISTINE GRUDZIEN, FREDERICK A. HOLMES, FRED M. SLOAN, LAUREEN WARRICK,
For themselves and all others similarly situated,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY, RCA CORPORATION, RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATION AND SUBSIDIARY COMPANIES, GE PENSION PLAN,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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MARK S. DICHTER
*Counsel of Record*
BRIAN J. DOUGHERTY
RICHARD G. ROSENBLATT
MORGAN, LEWIS & BOCKIUS LLP
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5291
*Counsel for Respondents*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether, upon a merger of two overfunded contributory defined benefit pension plans—as distinguished from a termination of a defined benefit pension plan—Section 208 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1058, requires an allocation, to or for the benefit of participants, of surplus assets attributable to employee contributions, that exist at the moment of the plan merger?

## SUPREME COURT RULE 29.6 STATEMENT

Respondent General Electric Company ("GE") certifies that it has no parent company. At one time, Respondent RCA Corporation was a subsidiary of Respondent General Electric Company. RCA Corporation no longer exists (except as a matter of trademark and intellectual property law).

General Electric Company itself has common stock and debt securities which are publicly traded. General Electric Company also has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries which have any outstanding equity or debt securities which are publicly held.

Those with publicly-held equity securities are:

—CAMCO, Inc. (Canada)
—General Electric Capital Corporation
(formerly General Electric Credit Corporation)
—Montgomery Ward & Co., Incorporated

Those which have only publicly-held debt securities are:

—Credit DeL'Est
—Finax FS AB
—Finax KK AB
—GE Capital Aviation Services, Ltd.
—GE Capital Mortgage Services, Inc.
—GE Capital (NZ) Ltd. (New Zealand company)
—GE Capital PTY Ltd. (Australia company)
—GECC Financial Corporation (Hawaii)
—GNA Corporation
—Gate Finance Corporation
—General Electric Capital Canada, Inc.
—General Electric Capital Services, Inc.
(formerly General Electric Financial Services, Inc.)
—General Electric Credit International, N.V.

—Imaging Financial Services, Inc.
(formerly Eastman Kodak Credit Corp.)
—International GE Capital Corporation
—Mercur Bank (Austria)
—Outlet Broadcasting, Inc.
—Service Bank GmbH

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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No. 97-1834

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KENNETH BRILLINGER, CHRISTINE GRUDZIEN,
FREDERICK A. HOLMES, FRED M. SLOAN,
LAUREEN WARRICK,
For themselves and all others similarly situated,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY, RCA CORPORATION,
RETIREMENT PLAN FOR THE EMPLOYEES OF
RCA CORPORATION AND SUBSIDIARY COMPANIES,
GE PENSION PLAN,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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### COUNTERSTATEMENT OF THE CASE

Petitioners challenge their failure to receive an additional allocation of pension assets solely as a result of the merger of the GE Pension Plan ("the GE Plan") with the Retirement Plan for the Employees of RCA Corporation and Subsidiary Companies ("the RCA Plan").[1] Specifically, Petitioners claim that Section 208 of the Employee

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[1] RCA became a wholly owned subsidiary of GE in 1986. (*Brillinger* Compl. ¶ 22).

Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1058, required GE to allocate to them or for their benefit a portion of the surplus assets existing in the RCA Plan at the moment of the merger. The only *material* facts alleged by Petitioners' Complaints that relate to this singular legal issue are straightforward and few:

- Prior to the merger, the RCA Plan and the GE Plan were defined benefit pension plans that contained employee contributions.
- Petitioners participated in the RCA Plan.
- Petitioners made employee contributions to the RCA Plan.
- The RCA Plan and the GE Plan merged, effective January 1, 1989.
- At the time of merger, the RCA Plan had assets that exceeded the present value of its liabilities by over $1 billion.[2]
- When the RCA Plan merged into the GE Plan, participants in each plan were entitled to pension benefits under the terms of the merged plan immediately after the merger that were at least equal to the benefits to which they were entitled under the terms of their respective predecessor plans immediately before the merger. Transitory surplus plan assets that existed under both plans immediately before the merger remained in trust for the exclusive benefit of participants but were not immediately distributed or allocated to increase the benefits of participants of either plan.[3]

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[2] As the Third Circuit noted in its opinion in *Malia v. General Electric Co.*, 23 F.3d 828, 830 (CA3), *cert. denied*, 513 U.S. 956 (1994), the GE Plan had assets that exceeded the present value of its liabilities by nearly $7.5 billion at the time of the merger.

[3] In their Petition, Petitioners cite as "facts" certain matters that are both incorrect and not found anywhere in the record pleadings below, including:

The Petitioners have failed to plead or otherwise to allege—even by way of argument—one *crucial* fact. Petitioners have never even suggested or implied in any way that the RCA Plan actually terminated. As explained in detail below, the absence even of an allegation that the RCA Plan terminated dispositively distinguishes the instant case—as a matter of fact and law—from *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288 (CA9 1997), *cert. granted*, 118 S. Ct. 1558 (Apr. 27, 1998), and conclusively refutes Petitioners' assertion that the Second Circuit's decision below conflicts with the Ninth Circuit's decision in *Jacobson*.

## REASONS FOR DENYING THE WRIT

### I. NO CONFLICT BETWEEN THE CIRCUITS EXISTS AND PETITIONERS' ATTEMPT TO SUGGEST OTHERWISE IS WHOLLY CONTRIVED.

It is clear from both the complaint and the respondents' brief in opposition to the petition for writ of certiorari in *Jacobson*, as discussed below, that the plaintiffs' claim to surplus pension assets in that case depends entirely on an allegation that the Hughes Aircraft pension plan terminated or on an argument that such a termination should be ordered by a court. Petitioners in *Brillinger*, by contrast, claim a share of "surplus" pension assets based solely on a merger of two ongoing plans. Accordingly, this case involves nothing more than a straightforward issue of stat-

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- Petitioners' statement that GE sold the assets of RCA's Consumer Electronics Division to Thomson Electronics and terminated the employment of the bulk of RCA employees. (Pet. at 8).
- Petitioners' suggestion that the RCA Plan was funded solely by employee contributions. (*Id.*). To the contrary, the very nature of a defined benefit pension plan imposes a statutory liability on the sponsoring employer to ensure that the plan has assets sufficient to fund promised benefits and to contribute whatever amounts may be necessary. *See* 29 U.S.C. § 1082(c)(11).

utory construction—whether ERISA Section 208, 29 U.S.C. § 1058, requires an allocation, to or for the benefit of plan participants, of that portion of surplus assets that may exist in a transitory sense at the moment of a pension plan merger, and that derives from investment gains attributable to the participants' contributions to either of the plans involved in the merger.

Section 208 provides, in relevant part, that:

> [a] pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a *benefit* immediately after the merger, consolidation, or transfer which is equal to or greater than the *benefit* he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. § 1058 (emphasis added). Petitioners base their claim on the language in Section 208 that compares benefits before and after a merger, in each case as "if the plan had then terminated." They argue that this reference to a *hypothetical* plan termination mandates the same allocation of *assets* (as distinguished from benefits) in a plan merger as that required under ERISA Section 4044(d)(3), 29 U.S.C. § 1344(d)(3),[4] when an employer *actually* terminates a pension plan under Title IV of ERISA.

*Two circuit courts (including the Second Circuit below) have considered this argument in the context of the 1989*

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[4] Section 4044(d)(3) provides that in the event of a plan *termination*:

> (A) . . . if any *assets* of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section [which establishes priority categories of accrued *benefits* when a plan is terminated], such remaining *assets* shall be equitably distributed to the participants who made such contributions or their beneficiaries . . .

29 U.S.C. § 1344(d)(3)(A) (emphasis added).

*merger of the RCA Plan and the GE Plan. Four federal district courts (two in unrelated cases) also have considered the contention. All have uniformly and categorically rejected Petitioners' argument. See Malia v. General Elec. Co.*, 91-CV-1743, 1992 WL 672267 (M.D. Pa. Aug. 10, 1992); *Malia v. General Elec. Co.*, 23 F.3d 828 (CA3), *cert. denied*, 513 U.S. 956 (1994); *Brillinger v. General Elec. Co.*, No. 3: 95-CV-02758 (PCD); *Brillinger v. General Elec. Co.*, 130 F.3d 61 (CA2 1997); *Flanigan v. General Elec. Corp.*, No. 3: 93-CV-516 (JBA) (D. Conn. Sept. 26, 1996); *Systems Council EM-3, Int'l Bhd. of Elec. Workers v. AT&T Corp.*, 972 F. Supp. 21 (D.D.C. 1997). *No federal district or appellate court has held to the contrary.* Accordingly, there is no compelling reason for the Court to expend its valuable but very limited resources to address the Petitioners' claim for a windfall.

To put this matter in perspective, this is the second time that representatives for the putative class in this case have asked the Court for an allocation of surplus assets as a result of the GE-RCA pension plan merger. In an earlier action, *Malia v. General Electric Co.*, 91-CV-1743, 1992 WL 672267 (M.D. Pa. Aug. 10, 1992), the United States District Court for the Middle District of Pennsylvania dismissed for failure to state a claim upon which relief could be granted, a claim *identical* to the claim raised by Petitioners here, brought by the *same* attorneys, and based on the *same* transaction, facts and legal theories as those on which Petitioners here rely.[5] In a thorough and well-

[5] *See Warrick v. General Elec. Co.*, 70 F.3d 736, 737-38 (CA2 1995) (in granting a writ of mandamus reversing the district court's transfer of this case pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Middle District of Pennsylvania, the Second Circuit acknowledged *Malia* and noted: "[T]he Middle District of Pennsylvania had previously dismissed an action *by individuals seeking essentially identical relief* as a result of GE's merger of the RCA Plan into the GE Plan, and the Third Circuit had affirmed the Middle District's dismissal for failure of the Complaint to state a claim.") (emphasis added).

reasoned opinion, the United States Court of Appeals for the Third Circuit affirmed that decision. 23 F.3d 828 (CA3 1994). After the Third Circuit had rejected the *Malia* plaintiffs' petition for rehearing and suggestion for rehearing *en banc*, the Court denied *certiorari* on October 17, 1994. *See* 513 U.S. 956 (1994).

On December 30, 1994, shortly after the Court refused to review the Third Circuit's decision in *Malia*, Petitioners, represented by the same attorneys as those who represented the plaintiffs in *Malia*—and in a classic example of forum shopping—filed this virtually identical action on behalf of the same putative class as in *Malia*.[6] The only differences between this case and *Malia* are the venue, the identity of the class representatives and the omission in this case of certain breach of fiduciary duty claims that the putative class advanced in *Malia*.

Before the Second Circuit's decision below, *Malia* was the leading—and the only—appellate decision addressing whether ERISA Section 208 required an allocation of pension surplus. The Third Circuit recognized the conceptual distinction between the "benefits" protected by Section 208 (which deals with pension plan mergers, consolidations and transfers) and the "residual assets" allocated under Section 4044(d)(3), 29 U.S.C. § 1344(d)(3) (which deals strictly with pension plan terminations). 23 F.3d at 831. The court in *Malia* analyzed the Section 4044 provisions that apply to actual plan termination, as follows:

> [Section 4044(a)] sets out the priority of allocation of assets of the plan on termination, giving first priority to accrued *benefits* derived from a participant's contributions to the plan which were not mandatory contributions; second priority to accrued *benefits* derived from mandatory contributions; third priority to *benefits* payable as an annuity; and fourth priority to

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[6] The district court dismissed *Malia* without addressing certification of the putative class, thereby allowing that same class to seek a different result in the Second Circuit.

> other and additional *benefits*. Subsections [4044(b)] and (c) provide for adjustment of allocations and increase or decrease in value of assets during the termination process. Subsection [4044(d)] then regulates the distribution of residual *assets* to the employer after the satisfaction of all liabilities to plan participants and their . . . beneficiaries. As described in [§ 4044(a)], those "liabilities" are the designated *benefits* payable to the participants. Section [4044(d)(3)(A)] then provides that, before any residual *assets* are distributed to the employer, "any *assets* of the plan attributable to employee contributions . . . shall be equitably distributed to the participants who made such contributions. . . ."
>
> *This language of [§ 4044] demonstrates clearly that "benefits" are elements that are conceptualized and treated differently in a plan termination than are the "assets" of that plan. "Benefits"* are computed in a different manner than *"assets."* Accrued *benefits are* placed on the liability side, rather than on the *asset* side of the balance sheet. "Residual *assets*" are computed only after liability for accrued *benefits* has been satisfied; "residual *assets*" are payable to the employer only after *assets* attributable to employee contributions have been returned to the employees.

23 F.3d at 831-32 (emphasis added).

The Third Circuit then turned for corroboration to the Treasury regulations under Section 414(*l*) of the Internal Revenue Code, 26 U.S.C. § 414(*l*), interpreting Section 208's requirements for plan mergers.[7] The court found the following provisions instructive:

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[7] Section 414(*l*) of the Internal Revenue Code, 26 U.S.C. § 414(*l*), is the corresponding Code provision that mirrors the plan merger rules set forth in Section 208 of ERISA. Thus, "all regulations implementing these provisions of [Sections 208 and 414(*l*)] have been promulgated by the Secretary of the Treasury, mostly under Section 414(*l*) of the Internal Revenue Code." *Van Orman v. American Ins. Co.*, 608 F. Supp. 13, 25 n.3 (D.N.J. 1984) (citing Section 101(a) of ERISA Reorganization Plan, Executive Order

> If the sum of the assets of all plans is not less than the sum of the present values of the *accrued benefit* (whether or not vested) of all plans, the requirements of section 414(*l*) will be satisfied merely by combining the assets and preserving each participant's *accrued benefits*. This is so because all the *accrued benefits* of the plan as merged are provided on a termination basis by the plan as merged.

23 F.3d at 832 (citing 26 C.F.R. § 1.414(1)-1(e)(1) (1994) (emphasis added). Finally, the Third Circuit noted that other federal courts have interpreted these regulations as limiting " 'benefits' under [§ 208] . . . to 'accrued benefits.' " *Id.* at 832 (citing *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1185 (S.D. Tex. 1991), *aff'd*, 36 F.3d 1308 (CA5 1994), *cert. denied*, 514 U.S. 1066 (1995), and *Van Orman v. American Ins. Co.*, 608 F. Supp. 13, 25 (D.N.J. 1984)). The court concluded "that §§ [208] and [4044(d)(3)] cannot be combined to provide plan participants with a right to residual assets in the context of a plan merger." *Id.* at 833.

The Second Circuit here undertook its own statutory analysis and reached the same result as the Third Circuit in *Malia*. *See* App. at 7a ("The issue we have dealt with here was addressed by the Third Circuit in *Malia v. General Electric Co.*, 23 F.3d 828 (3d Cir. 1994). Our conclusion is the same although our discussion is somewhat different.").[8]

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12108, Dec. 28, 1978 (44 Fed. Reg. 1065)), *on remand from* 680 F.2d 301 (CA3 1982); *see also Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 509-11 (CA2 1994); *Malia*, 23 F.3d at 832 n.4.

[8] Petitioners argue that the Second Circuit's distinction between assets and benefits "contradicts the title and direction of 29 U.S.C. § 1344(a)," requiring an allocation of assets to provide for specified categories of benefits. (Pet. at 17). Presumably, Petitioners do not believe that distinction contradicts the actual *text* of Section 4044(a)—and indeed, it does not. Section 4044(a) requires an allocation of available assets to the extent necessary to fund specified benefits; it does not thereby convert those assets themselves into "benefits."

Respondents note that, apart from the Second Circuit's decision below, the United States District Court for the District of Columbia has followed the *Malia* analysis in an unrelated case. In *Systems Council EM-3, supra,* 972 F. Supp. 21, the plaintiffs challenged a pension plan formula for allocating residual pension plan assets upon a "spin-off" (*i.e.,* transfer) of plan assets and liabilities from one ongoing defined benefit pension plan to another such plan. The plaintiffs, who were represented by the same counsel who represents Petitioners here, relied on the same interpretation of Sections 208 and 4044 that Petitioners advance in this case in their effort to obtain pension surplus *without* a plan termination. *Id.* at 33-34. The district court rejected the plaintiffs' argument as follows:

> The reasoning of *Malia* is both *instructive* and *persuasive*. In that case, two pension plans were being merged and the beneficiaries of one of the original plans sought to have their benefits under the new, merged plans increased by a share of the residual assets that existed in their original plan at the time of the merger. The *Malia* court rejected the claim that ERISA sections 208 and 4044 should be read to give the beneficiaries a claim to the residual assets of the plan. In reaching its conclusion, the court discussed the distinction in ERISA's language between "benefits" and "assets", stating "[t]his language . . . demonstrates clearly that 'benefits' are elements that are conceptualized and treated differently in a plan termination than are 'assets' of that plan." *Malia,* 23 F.3d at 831-32. *This distinction is sufficiently persuasive and supported by the language of both ERISA and its implementing regulations to defeat Plaintiffs' claim.*

972 F. Supp. at 34 (emphasis added).[9]

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[9] *See also Flanigan v. General Elec. Corp.,* 3:93-CV-516 (JBA) (D. Conn.) (Sept. 26, 1996 Bench Ruling, at 151-53) (per Arterton, J.) (in this case, decided prior to the Second Circuit's decision in

In all, the following courts have considered and rejected the statutory construction of ERISA Section 208, 29 U.S.C. § 1058, that Petitioners advance here: Judge Kosik of the United States District Court for the Middle District of Pennsylvania; Chief Judge Dorsey and Judge Arterton, both of the United States District Court for the District of Connecticut; Judge Kessler of the United States District Court for the District of Columbia; a unanimous panel of the United States Court of Appeals for the Second Circuit; and a unanimous panel of the United States Court of Appeals for the Third Circuit.[10] As discussed immediately below, the only case that Petitioners cite in their effort to contrive a conflict, *Jacobson v. Hughes Aircraft Co., supra,* does not involve the statutory issue resolved in *Malia* and this case.[11] There is no federal appellate (or

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*Brillinger,* the district court, relying, *inter alia,* on *Malia,* dismissed a claim for an allocation of plan surplus in connection with a spin-off of assets, holding: "[T]he Court is convinced by [the] reasoning of *Malia* . . ."). A copy of Judge Arterton's September 26, 1996 Bench Ruling is attached to General Electric's Brief for Appellees, which is part of the Second Circuit record in this case.

[10] In addition, the Third Circuit in *Malia* and the Second Circuit in this case both refused requests for rehearing *en banc,* and the Court previously denied *certiorari* in *Malia.*

[11] Respondents note Petitioners' citation to *Hickerson v. Velsicol Chemical Corp.,* 778 F.2d 365 (CA7 1985), *cert. denied,* 479 U.S. 815 (1986). Petitioners' reliance on *Hickerson* is puzzling. First, that decision relates to a conversion by amendment of a defined contribution plan into a defined benefit pension plan. *Id.* at 367. This issue has no bearing on the issue presented in this case. Second, the Seventh Circuit in *Hickerson* did *not* hold—or even imply—that ERISA Section 208 should be interpreted as Petitioners urge. Indeed, the *Hickerson* court did not even purport to interpret Section 208. Third, if anything, *Hickerson* actually is consistent with the decision of the Second Circuit in this case. The Seventh Circuit noted: "But we do not think that ERISA and the accompanying regulations support plaintiffs' argument because ERISA's fiduciary principles protect employees' claims to accrued *benefits, not* their ownership of pension fund *assets.*" *Id.* at 374 (emphasis added).

trial) court decision contrary to the Second Circuit's decision in this case, and there is no conflict among the circuits.

## II. *JACOBSON v. HUGHES AIRCRAFT* DOES NOT CONFLICT WITH THE DECISION OF THE SECOND CIRCUIT IN THIS CASE, AND THE COURT'S DISPOSITION OF THAT CASE WILL HAVE NO BEARING ON THIS CASE.

In their effort to create a split in authority regarding the interpretation of ERISA Section 208, Petitioners rely almost exclusively on *Jacobson v. Hughes Aircraft Co.*, a case pending review by the Court. Petitioners' argument that such a conflict exists is contrived at best.

In *Jacobson* the employer allegedly used pension assets attributable to employee contributions to fund additional pension benefits, including certain early retirement benefits. The plaintiffs alleged that Hughes Aircraft had violated ERISA by "improperly using plan assets attributable in part to employee contributions for its own benefit." 105 F.3d at 1291. Specifically, the plaintiffs pleaded in their complaint that Hughes Aircraft violated the following six provisions of ERISA: (1) Section 403(c)(1)'s anti-inurement provision, 29 U.S.C. § 1103(c)(1), which provides that plan assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants of the plan"; (2) Section 404, 29 U.S.C. § 1104, which generally requires an ERISA plan fiduciary to administer a plan solely in the interest of plan participants and beneficiaries; (3) Section 203(a), 29 U.S.C. § 1053(a), which prohibits forfeiture of vested benefits; (4) Section 4044, 29 U.S.C. § 1344, which requires an allocation of plan assets upon a plan termination (as distinguished from a plan merger or spin-off); (5) Section 406(a)(1)(D), 29 U.S.C. § 1106 (a)(1)(D), which prohibits the "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan"; and (6) Section 404(a)(1)(D), 29 U.S.C.

§ 1104(a)(1)(D), which specifically requires that a plan fiduciary must carry out its duties "in accordance with the documents and instruments governing the plan." 105 F.3d at 1292, 1296, 1298, 1300, 1301, 1302.

Notwithstanding these myriad claims, one claim is conspicuously absent. The plaintiffs in *Jacobson* did not suggest any violation of ERISA Section 208, 29 U.S.C. § 1058, which is the *only* claim presented by Petitioners' Complaints in this case.[12]

In fact, the *singular* similarity between *Jacobson* and this case is a claim for a share of surplus pension assets attributable to participant contributions. The plaintiffs in *Jacobson,* however, base that claim entirely on an allegation that the Hughes Aircraft pension plan "terminated . . . within the meaning of ERISA § 4044, 29 U.S.C. § 1344 . . ." (Pet. for Writ of Certiorari in *Jacobson* at App. at 141a). The *Jacobson* plaintiffs clearly recognized—and have acknowledged repeatedly—that there can be no allocation of surplus, nor can surplus even exist, without a plan termination under Title IV of ERISA. (*See* Respondents' Br. in Opp'n in *Jacobson,* at 1, 5, 6-7).[13]

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[12] Indeed, Petitioners in this case have noted that the district court in *Jacobson* denied the plaintiffs in that case leave to amend their complaint and, thus, "foreclosed consideration of claims that the *Hughes* transaction should be treated as a transfer or merger under 29 U.S.C. § 1058." (Pet. at 13). In fact, that issue is not before the Court in *Jacobson.*

[13] In response to these acknowledgments by the *Jacobson* plaintiffs, Hughes Aircraft observed in its reply brief in support of its petition for writ of certiorari to the Court: "[R]espondents [*i.e.,* the plaintiffs in *Jacobson*] have now made it clear that the termination issue is central to all of the other claims they have raised in this case. Their various allegations regarding violations of ERISA's fiduciary duties and structural provisions are inherently intertwined with their arguments about the supposed termination of the Plan. . . ." (*See* Petitioners' Reply to Br. in Opp'n in *Jacobson,* at 8).

For precisely this reason, Petitioners' suggestion that *Jacobson* could somehow be resolved under ERISA Section 208 (Pet. at 13-15) is utterly without merit. The parties in *Jacobson* are in full agree-

By contrast, Petitioners have never pleaded, argued or even suggested that the RCA Plan was somehow terminated. They have instead forthrightly and relentlessly maintained, both in *Malia* and here, that they are entitled to a share of surplus pension assets *without* a plan termination. This fundamental distinction between Petitioners' claims and those of the *Jacobson* plaintiffs establishes conclusively the absence of any conflict between the Ninth Circuit's decision in *Jacobson* and the Second Circuit's decision below.[14]

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ment that the participants would be entitled to an allocation of surplus pension assets *only* if there were an actual plan termination under Title IV of ERISA—not merely a plan amendment, merger, or transfer of assets and liabilities.

[14] It is not difficult to understand, in practical terms, why ERISA requires an allocation of surplus pension assets *only* when a defined benefit pension plan is *actually* terminated. In that event the plan's liabilities become fixed, and the value of the assets available to meet those fixed liabilities becomes determinable at the time for disposition of those assets. The plan's affairs are wound up, and any assets that are not needed to pay the benefits promised under the plan can be distributed or otherwise used as prescribed by Section 4044(d) of ERISA.

When a merger or spinoff of defined benefit pension plans occurs, on the other hand, the resultant plan or plans are ongoing. There can be no final accounting. As the United States Court of Appeals for the Seventh Circuit explained:

> Pension law covers bad times as well as good times. In bad times (when declines in the value of assets make plans underfunded) employers must contribute more. If in good times employers were required to distribute the surplus to retirees on the theory that they "owned" that value, outcomes would be asymmetric. Employers would be liable for shortfalls but could reap no benefit from surpluses. Rational employers would respond to that structure by reducing the levels of benefits promised in plans (or by creating fewer plans). Neither effect would serve employees' long run interests; neither would be consistent with the purposes underlying ERISA.

*Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (CA7 1994). Thus, Section 208 does not require an allocation of any surplus that might exist at the time of a merger or spinoff.

Moreover, due to these differences between the two cases, this Court's disposition of *Jacobson* would in no event require reconsideration of *Brillinger*. If the Court supports Hughes Aircraft, reverses the Ninth Circuit and remands *Jacobson*, that result and its underlying rationale undeniably would support the Second Circuit's decision here. If the Court holds for the plaintiffs and affirms the Ninth Circuit, on the other hand, that decision would not reach Petitioners' claims under ERISA Section 208, since Section 208 is not at issue in *Jacobson*. Rather, an affirmance presumably would be based on a conclusion that a plan termination either had occurred or should be ordered by a court. (*See* Pet. for Writ of Certiorari in *Jacobson*, at App. 141a; Respondents' Br. in Opp'n in *Jacobson*, at 6-7: "Neither plaintiffs nor the Ninth Circuit ever suggested bypassing the means for termination set forth in Title IV. [Footnote omitted.] Plaintiffs' request is precisely that Hughes be ordered to use those means."). Neither rationale would implicate any need to allocate pension surplus in a plan merger.

## III. THERE IS NO COLLATERAL REASON TO REVIEW THE SECOND CIRCUIT'S DECISION IN THIS CASE.

This case presents a straightforward question of statutory interpretation and nothing more. The Second and Third Circuits are in full agreement, and four federal district courts have joined the chorus, including two lower court decisions in unrelated cases: *neither a merger of overfunded contributory defined benefit pension plans, nor any other transaction subject to ERISA Section 208 that involves such plans, triggers an allocation, to or for the benefit of plan participants, of surplus existing in a transitory sense at the time of the transaction, to the extent such surplus is attributable to participant contributions.*

The Ninth Circuit's decision in *Jacobson* is not to the contrary. In fact, Petitioners have cited no federal court decision, and Respondents are aware of none, that con-

flicts with *Malia* or *Brillinger*. Only Petitioners themselves seem to disagree with the Second Circuit's decision below.

Perhaps for this reason Petitioners ignore the fact that *all* accrued benefits were preserved in the RCA Plan-GE Plan merger, in accordance with Section 208, and they instead devote much of their Petition to hypothetical "horribles" that might someday occur if they are denied the windfall they seek.[15] Petitioners' concerns are far more fantasy than fact. As the district court noted in *Systems Council EM-3* with respect to a similar argument: "Rhetorical or emotional arguments voicing fears about the future . . . simply cannot substitute for rigorous analysis of the pertinent statutory provisions." *Systems Council EM-3*, 972 F. Supp. at 27. Neither those statutory provisions nor their legislative history support Petitioners' claim. In the end, the relief Petitioners seek must be obtained from Congress, not from the courts. As this Court has so frequently admonished, it is the role of Congress, not the judiciary, to reconsider its legislative compromises. *See, e.g., Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts

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[15] Respondents note that the hypothetical situations Petitioners describe have little or no basis in reality. Petitioners imagine, for example, that GE might have transferred pension assets and liabilities to Thomson Electronics ("Thomson"), but retained the full amount of any surplus existing in the RCA Plan at that time, when it sold assets of RCA's Consumer Electronics Division to Thomson. Petitioners posit that GE might then have terminated the RCA Plan and received any surplus attributable to contributions by participants for whom pension assets and liabilities were transferred to Thomson. (Pet. at 15-16). GE, of course, never took such action. Moreover, the merger of the RCA Plan with the GE Plan unequivocally precluded such a result. The GE Plan expressly prohibits any reversion of surplus assets to GE upon an actual plan termination. (*See* GE Pension Plan, Section II(1)-(2), attached as Exhibit "E" to each of the Memoranda of Law of Defendants in Support of Their Motion to Dismiss Plaintiffs' Complaints Pursuant to Fed. R. Civ. P. 12(b)(6), filed in *Warrick* and *Brillinger* below, Item 18, *Warrick* District Court docket entries, and Item 13, *Brillinger* District Court docket entries).

are not authorized to rewrite a statute because they might deem its effects susceptible to improvement.").

## CONCLUSION

This case involves a single issue of statutory interpretation that has been resolved uniformly by two federal appellate courts and four federal district courts. No federal court has reached a contrary result. For these reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARK S. DICHTER
*Counsel of Record*
BRIAN J. DOUGHERTY
RICHARD G. ROSENBLATT
MORGAN, LEWIS & BOCKIUS LLP
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5291
*Counsel for Respondents*

June 12, 1998

Supreme Court, U.S.
FILED
JUN 24 1998
CLERK

No. 97-1834

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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KENNETH BRILLINGER, CHRISTINE GRUDZIEN, FREDERICK A. HOLMES, FRED M. SLOAN, LAUREEN WARRICK, for themselves and all others similarly situated,
*Petitioners,*

v.

GENERAL ELECTRIC COMPANY; RCA CORPORATION RETIREMENT PLAN FOR THE EMPLOYEES OF RCA CORPORATION AND SUBSIDIARY COMPANIES GE PENSION PLAN,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY BRIEF OF PETITIONERS

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KENT CPREK
(Counsel of Record)
SAGOT, JENNINGS & SIGMOND
510 Walnut Street, 16th Floor
Philadelphia, PA 19106-3683
(215) 351-0615

NORMAN ZOLOT
264 Amity Road, P.O. Box 3541
Woodbridge, CT 06525

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

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No. 97-1834

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KENNETH BRILLINGER, CHRISTINE GRUDZIEN, FREDERICK A. HOLMES, FRED M. SLOAN, LAUREEN WARRICK, for themselves and all others similarly situated,

*Petitioners,*

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*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## REPLY BRIEF OF PETITIONERS

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### I. GE'S ARGUMENT IS INDISTINGUISHABLE FROM THE ARGUMENTS IN *HUGHES AIRCRAFT v. JACOBSON* ON WHICH THE COURT GRANTED CERTIORARI

GE argues that there is no conflict in the circuits. The Petitioners in *Hughes Aircraft v. Jacobson*, No. 97-1287, cert. granted, —— U.S. ——, 118 S.Ct. 1558, 66 U.S.L.W. 3531 (April 27, 1998), felt differently, made the same arguments as GE and cited the decision of the

Second Circuit in this case as a direct conflict with the Ninth Circuit:

> The decision [in *Jacobson v. Hughes Aircraft*, 105 F.3d 1288 (9th Cir. 1997)] below rests, at bottom, on the erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan. Respondents are concededly receiving their defined benefits; the challenged amendments in no way affect those benefits. Rather, respondents contend that their property rights extend to the Plan assets, and that the challenged amendments violated those rights. . . .
>
> * * * *
>
> . . . Whether a defined-benefit plan has a surplus or a deficit at any given moment prior to plan termination is of no consequence to plan participants—regardless of the plan's financial health, they are entitled to their defined level of benefits, no more and no less. *See, e.g.*, [*Johnson v.*] *Georgia-Pacific*, 19 F.3d [1184] at 1189-90 [7th Cir. 1994] [4]

[4] The only exception to this general rule is expressly created by the statute itself: regardless of the level of defined benefits, employees have a "vested right" to receive benefits equal to their mandatory contributions plus an imputed rate of interest. 29 U.S.C. § 1053(a)(1), 1054(c)(2). These vesting provisions ensure that employees cannot receive less than they would have made by putting their money in a conservative, interest-bearing account, thus preventing employers from requiring employees to contribute to a plan in exchange for an unfairly low level of defined benefits, as measured by a defined *interest* rate. Nowhere, however, does ERISA authorize or entitle employees to receive any of the additional *investment* return that may have been generated by their mandatory contributions.

Here again, the Ninth Circuit brought itself into manifest conflict with the Seventh Circuit, as well as with the Second and Third Circuits, each of which also has held that "[p]articipants in a defined benefit

> plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities." *Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997); *Malia* [*v. GE*], 23 F.3d [828] at 831 n.2, 832-33 [(3d Cir. 1994)]. As these cases emphasize, the participants' "benefits" in a contributory defined-benefit plan do *not* include a portion of any plan assets above and beyond their defined benefits. *See, e.g., Brillinger*, 130 F.3d at 64; *Malia*, 23 F.3d at 831-33 (same). If this case had been filed in the Second, Third, or Seventh Circuits, accordingly, it would readily have been dismissed.

Petition for Writ of Certiorari, *Jacobson v. Hughes Aircraft*, No. 97-1287, pp. 16-17, 18 and n. 4, 19. The Court properly granted *certiorari* based on the conflict in circuits over whether 29 U.S.C. § 1344(d)(3), directly in *Hughes* or by incorporation into 29 U.S.C. § 1058 in this case, is an additional "exception . . . in ERISA to authorize or entitle employees . . . to receive the additional investment return [over a low and safe interest rate] generated by their mandatory contributions," *id.*, before that money is used to offset an employer's obligation to pay benefits for another group of employees through a plan reorganization.

## II. GE'S CENTRAL ARGUMENT ON THE MERITS THAT THE TERM "BENEFIT" IN 29 U.S.C. § 1058 REALLY MEANS "ACCRUED BENEFIT" DISREGARDS THE DECISIONS OF THE COURT

The balance of Respondents' Brief in Opposition asks the Court summarily to accept GE's argument that the term "benefit" in 29 U.S.C. § 1058 really should be read to refer only to the naked promise of an "accrued benefit," as defined in 29 U.S.C. § 1002(23)(A), rather than the underlying plan assets which are allocable to a participant as "security" for that promise under 29 U.S.C. § 1344. This argument ignores the teachings of the Court on statutory interpretation.

*West Virginia University Hospitals v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 1147 (1991), holds that "[t]o supply omissions transcends the judicial function" as ". . . the purpose of a statute includes what it resolves to leave alone," id. The statutory language and policy of Congress clearly and logically defined the "benefit" of an employee which is protected by 29 U.S.C. § 1058 as the assets allocated to him under 29 U.S.C. § 1344 in the event of a current plan termination.

Congress has defined the term "accrued benefit" to refer to the naked promise to a participant of a life annuity at and after normal retirement age—whether funded or unfunded, 29 U.S.C. § 1002(23)(A). Congress has used the defined term where it desired to refer to the pension "promise," without regard to its funding status, in 29 U.S.C. § 1344, 29 U.S.C. § 1344(a)(1) ("*accrued benefit* which is derived from the participants' contributions . . . which were not mandatory contributions"); 29 U.S.C. § 1344(a)(2) ("*accrued benefit* which is derived from a participant's mandatory contributions."), and elsewhere throughout ERISA, 29 U.S.C. §§ 1002(19), 1021, 1023(d)(6)(D), 1025(a)(1), 1052, 1053, 1054, 1055, 1056, 1059(a)(1), 1082(c)(8), 1085(b)(1)(B), 1322(b)(6), 1412(b), 1421(b)(7)(B), 1422(a)(1)(B), 1425, 1441(c)(2)(B), and the Internal Revenue Code, 26 U.S.C. §§ 401, 411, 412, 414, 415. Congress has most noticeably protected only the promise of an "accrued benefit" in multiemployer plan transfers, 29 U.S.C. § 1411 (b)(2).[1]

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[1] Multiemployer plans are collectively bargained and are governed by a joint board of employer and employee representatives, 29 U.S.C. §§ 1002(37) 1301(a)(3), 1002(16)(B)(iii), 186(c)(5.). These plans generally involve fixed contributions by a number of employers, *Connolly v. PBGC*, 581 F.2d 729, 731 (9th Cir. 1978); *Penn v. Howe Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990). Employee contributions and reversion of assets to employers are unknown in such plans due, among other things, to the difficulty of dealing with employee authorizations and payroll deductions and

GE's purported distinction between "assets" and "benefits" does violence to the statutory language as well as the asset allocation process underlying 29 U.S.C. §§ 1058, 1344. If the simple term "benefit" already excluded statutory rights to payment, the limiting phrase "under the plan" as a modifier of "benefits" in 29 U.S.C. § 1344(a)(6) would be compleely superfluous—even though *Mead Corp. v. Tilley*, 490 U.S. 714, 722-723, 109 S.Ct. 2156, 2162 (1989), attributes meaning to it. See also, *Rettig v. PBGC*, 744 F.2d 133, 138 (D.C. Cir. 1984) (PBGC views qualifying language "under the plan" as limiting benefits under 29 U.S.C. § 1344(a)(6) to "contractual" benefits as opposed to statutory rights).[2]

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division of any residual assets with multiple past and current contributing employers.

Congress has not provided rules for allocating assets to individual pension liabilities in multiemployer plans. The law instead simply requires a multiemployer plan to continue paying annuity benefits with sequential limitations and reductions down to the level of PBGC guarantees until it runs out of money. 29 U.S.C. §§ 1421(c), 1425, 1426(a), 1441. At that point, PBGC takes over with its guarantee, 29 U.S.C. §§ 1322A, 1431. Multiemployer plans are correspondingly excluded from 29 U.S.C. § 1058 by its last sentence.

[2] The reliance placed on references to "accrued benefits" in regulations under 26 U.S.C. § 414(1) in *Malia* and other precedent is misplaced. The 414(1) regulations were issued in 1979, T.D. 7638 (August 16, 1979) and have not been updated. The IRS has acknowledged that references to "accrued benefits" are obsolete in light of the addition of protection for contingent benefit obligations (even though they are not "accrued benefits") in 1984 through 29 U.S.C. § 1054(g)(2) and 26 U.S.C. § 411(d)(6). See, Rev. Rul. 86-48, 1986-1 C.B. 216, and Rev. Rul. 85-6, 1985-1 C.B. 133 (contingent obligations must be valued under 26 U.S.C. § 414(1) despite language of regulations). C.f., *PBGC v. Piggly Wiggly Southern, Inc.*, 19 E.B.C. 1163, 1166-1167 (N.D. Ala. 1995) aff'd 91 F.3d 164 (11th Cir. 1996) (table) (PBGC regulation can no longer be applied as written due to intervening statutory change in Internal Revenue Code). If the IRS intended to adopt the view, accepted in *LLC Corp. v. PBGC*, 703 F.2d 301 (8th Cir. 1983), that employee money should be applied to benefits first so as to leave all residual

The omission of the word "accrued" to modify "benefit" in 29 U.S.C. § 1058 for single-employer plans is instead a considered and intentional choice of language and policy by Congress.

Congress did not use the term "accrued benefit" in Section 1058 and provided instead only for a benefit defined by an allocation of existing plan assets. If the statute read as GE proposes to amend it, employers who sponsor underfunded plans would be obligated immediately and fully to fund all promised retirement checks—in order to assure that each employee would receive his "accrued benefit" if the plan terminated immediately after the merger or transfer—as a condition to any merger or transfer of pension plans. Mergers and transfers of underfunded plans predictably would come to a screeching halt and deprive the economy of flexibility which it needs to allow benefit changes in the context of corporate reorganizations.

GE surely would object to a mandate for immediate funding of all pension promises as a condition to a merger or transfer in an underfunded plan. It nonetheless objects to a converse obligation to give employees the benefit of the investment of their contributions in an overfunded plan. The short-sighted opportunism in the rule advocated by GE was rejected by Congress in its choice of an asset allocation test for Section 1058 and the emphatic purpose of 29 U.S.C. § 1344(d)(3) to assure that employees receive the fruits of investment gain by a pension plan to which they have contributed.

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assets to the employer in its regulations, that approach likewise became obsolete with the Congressional decision to enact 29 U.S.C. § 1344(d)(3) in 1987. As explained in *H.R. Report 100-391*, reprinted [1987] U.S. Code Cong. & Admin. News at 2313-104, this change reversed *LLC Corp.* and such views to assure that there will "virtually always be a distribution to participants and beneficiaries" of residual assets of a pension plan to which they have contributed.

## CONCLUSION

The Court should grant *certiorari* or hold this case pending disposition of *Hughes Aircraft v. Jacobson*. If the Court determines that employees have a right to protection of assets attributable to their employee contributions against dilution in a merger or transfer, the case should be remanded for further proceedings in accordance with the decision of the Court.

Respectfully submitted,

KENT CPREK
(Counsel of Record)
SAGOT, JENNINGS & SIGMOND
510 Walnut Street, 16th Floor
Philadelphia, PA 19106-3683
(215) 351-0615

NORMAN ZOLOT
264 Amity Road, P.O. Box 3541
Woodbridge, CT 06525